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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 771

CAVALIER VENDING CORPORATION, FOR ITSELF AND ON BEHALF OF ALL OTHERS ENGAGED IN LIKE OR SIMILAR BUSINESS WITHIN THE COMMONWEALTH OF VIRGINIA, AND ERIC REISFELD, *Appellants,*

vs.

THE STATE BOARD OF PHARMACY, A PUBLIC CORPORATION COMPOSED OF OFFICERS OF GOVERNMENT AND ALL OF ITS OFFICERS, AGENTS, SERVANTS, EMPLOYEES AND ALL LAW ENFORCEMENT OFFICERS AND AGENTS ACTING UNDER ITS DIRECTION; DR. D. D. GRAY, HOWARD A. WHITEHEAD, GUY L. MILLER, HAROLD L. BEAMER, AND JAMES E. STEGER, MEMBERS OF THE STATE BOARD OF PHARMACY, *Appellees*

APPEAL FROM THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA

STATEMENT AS TO JURISDICTION

Cavalier Vending Corporation, for itself and on behalf of all others engaged in like or similar business within the Commonwealth of Virginia, and Eric Reisfeld, Appellants, applicants herein for an appeal to the Supreme Court of

the United States from the judgment of the Supreme Court of Appeals of the State of Virginia, dated and entered on the 25th day of January, 1954, with respect to which a petition for a rehearing filed on the 23rd day of February, 1954, was denied on the 16th day of March, 1954, present, in accordance with the requirements of paragraph 1, of Rule 12 of the Rules of the Supreme Court of the United States, this separate statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment in question.

I

Statutory Provision Sustaining the Jurisdiction of the Supreme Court of The United States

This is an appeal under Section 1257(2) of Title 28, Judicial Code and Judiciary, of the United States Code (62 Stat. 929), approved June 25, 1948, from a final judgment of the Supreme Court of Appeals of Virginia, dated and entered on the 25th day of January, 1954, with respect to which a petition for a rehearing was denied on the 16th day of March, 1954, which judgment is a final judgment rendered in the highest court of the State of Virginia in which a decision could be had, where is drawn in question the validity of a statute of the State of Virginia on the ground of its being repugnant to the Constitution of the United States, and the decision is in favor of the validity of such statute.

II

State Statute the Validity of Which is Involved

The statute of the State of Virginia, the validity of which is involved is an Act of the General Assembly of Virginia, approved March 11, 1952, designated as Chapter 298, Acts of Assembly of Virginia, 1952, and found at page 389 of

said Acts (Section 18-89.1 of the Code of Virginia). The statute reads as follows:

"CHAPTER 298

"An Act to restrict the sale of certain commodities; to require certain permits and prescribe the fees therefor; to confer the rule making power upon the State Board of Pharmacy and to impose upon it certain duties; to prohibit certain acts, provide penalties for violations and provide for the destruction of certain property; and to provide for the disposition of certain funds.

"Be it enacted by the General Assembly of Virginia:

"§ 1. No drug, medicinal preparation, appliance, device or other article intended or having special utility for the prevention of venereal disease, hereinafter referred to as device, shall be sold or otherwise disposed of in this State except by duly licensed practitioners of medicine; and in pharmacies and retail outlets. Pharmacies and retail stores desiring to sell such devices shall apply in writing to the State Board of Pharmacy and the Board shall issue a permit for the sale thereof. Such devices may be sold by wholesalers regularly transacting business as such, but it shall be unlawful for any wholesaler to knowingly sell such devices to any unlicenesd retailer.

"§ 2. The offering for sale, distribution or other disposition by means of a vending machine or other automatic machine of such devices is expressly prohibited.

"§ 3. Any such vending machine or other automatic machine shall be destroyed when found in violation hereof. Possession of such devices by any unlicensed retailer in his place of business shall be prima facie evidence of sale.

"§ 4. The State Board of Pharmacy shall enforce the terms of this act and may establish minimum standards of quality for such devices which standards of

quality shall be such as will tend to reduce the likelihood of contracting a venereal disease.

"§ 5. Any person who violates any of the provisions of this act or regulation of the Board shall be guilty of a misdemeanor."

The particular provisions of the statute attacked in this proceeding are Section 2 thereof, by which the offering for sale, distribution or other disposition of the devices mentioned in the statute by means of a vending machine or other automatic machine is prohibited, and Section 3 thereof, which directs the destruction of any such vending machine or other automatic machine when so used.

III

Dates of Judgment and Presentation of Application for Appeal

The judgment of the Supreme Court of Appeals sought to be reviewed was dated and entered on the 25th day of January, 1954; a petition for a rehearing thereon was filed on the 23rd day of February, 1954, which petition was denied on the 16th day of March, 1954. The petition for appeal was presented to the Honorable Edward W. Hudgins, Chief Justice of the Supreme Court of Appeals of Virginia on the 10th day of April, 1954.

IV

Nature of the Case and Manner in which the Federal Questions were Raised

On May 27, 1952, Cavalier Vending Corporation, one of the appellants herein, filed its bill for injunction in the Circuit Court of the City of Richmond against The State Board of Pharmacy, its members, agents, and employees, and all law enforcement officers and agents acting under its direction, praying that the defendants be enjoined from enforcing

Chapter 298 of the Acts of Assembly of Virginia, 1952, and from taking action interfering with the Complainant and its property in the exercise of its rights in carrying on its business of dispensing prophylactic devices through the medium of vending machines.

The bill alleged that the complainant was engaged in the business of possessing and selling, in the due course of trade, by and through the medium of coin-operated vending machines, placed and located by the complainant in the lawful places of business operated by others, all of whom are adults over the age of 21 years and duly licensed to conduct business in Virginia, prophylactic rubber merchandise or goods, having special utility for the prevention of venereal disease, for sale to adult male persons, the persons operating such places of business allowing the complainant to locate its vending machines in such places and sharing in the proceeds from the sale of the merchandise with the complainant, who keeps the machines supplied with merchandise and services or replaces such machines with same when necessary. The Bill also alleged that the complainants' investment in such machines located in places of business throughout Virginia was approximately Seven Thousand Dollars; that the monetary investment expended by the complainant in building up its business in Virginia over several years was approximately Twenty-five Thousand Dollars. The action was brought on behalf of all others, individuals or corporations, resident of Virginia, who were engaged in the same business and it was alleged that such others had invested approximately Two Hundred Twenty-five Thousand Dollars in such businesses.

In the bill of complaint itself the statute involved was attacked as being in contravention of the Due Process Clause and the Equal Protection Clause of Section I of the Fourteenth Amendment of the Constitution of the United

States. Omitting here such portions of the bill dealing with the attacks on the validity of the statute under the Virginia Constitution and principles of Virginia law we quote below the provisions of the bill (see pages 2-8 of the printed record in the Supreme Court of Appeals of Virginia, and particularly pages 5 and 6 thereof) by which the Federal questions were raised at the outset of the case.

> "Your complainant believes and alleges that the said Act is unconstitutional, invalid, and void for the following reasons.
>
> "B. The act makes it a criminal offense to sell certain merchandise (prophylactic devices) not measuring up to minimum standards of quality without first defining or establishing the standards by which the guilt of the accused person is to be determined, or by requiring that the said minimum standards of quality be established, all of which is in violation of the Fourteenth Amendment to the Constitution of the United States * * *."
>
> * * * * * * *
>
> "D. The act here in issue is unconstitutional and void in that it violates Section I of the Fourteenth Amendment to the Constitution of the United States * * * and is not within the police power of the state, all in the following respects:
>
> "1. It would arbitrarily deny your complainant page 5 and all others similarly situated the right to engage in a lawful business; i. e. the selling of prophylactic devices.
>
> "2. It would deny your complainant and all others similarly situated, the equal protection of the law, in that it prohibits them from selling prophylactic devices and subjects them to property loss and criminal prosecution while it does not prohibit other sellers from selling the same device or subject them to the same penalties.
>
> "3. It would permit the summary seizure and de-

struction of your complainant's property and that of all others similarly situated without resort to legal process and without compensation, all in violation of due process of law.

"4. The act arbitrarily creates class legislation in (1) that it prohibits your complainant and all others similarly situated from selling merchandise which may be sold by any retailer and (2) it prohibits the sale of prophylactic devices through vending machines while it does not prohibit the sale of any other merchandise through vending machines.

"5. The act is unconstitutional and void and contravenes the proper exercise of the police power of the Commonwealth in that although the act has the appearance of seeking to regulate, within the valid limitations of the state's police power, the sale of prophylactic devices as affecting the public health, welfare and morals, it is in truth legislation directed solely at your complainant and all those similarly situated to deny it the right to sell lawful merchandise in a lawful manner and this is obvious because the act itself totally fails to establish any regulations giving effect to or necessary for the carrying out of the ostensible objects of the act in the following respects:

"a. Any person, male or female, adult or minor, may sell prophylactic devices. (Any person holding a permit may sell prophylactic devices and the issuance of a permit is made mandatory at the seller's request to the State Board of Pharmacy. This act does not require any seller to meet any moral or professional standards.)

"b. Any person, male or female, adult or minor, may purchase prophylactic devices.

"c. Prophylactic devices may be sold at any time and at any place.

"d. No standards and quality are established under which prophylactic devices are sold.

"e. Prophylactic devices may be sold in any manner whatsoever *except* by vending machines."

A preliminary injunction restraining the enforcement of the statute was issued by the Circuit Court of the City of Richmond on June 23, 1952. By letter to counsel, filed in the Clerk's Office of the Circuit Court of the City of Richmond on August 15, 1952, the judge of that Court advised that it was his judgment that Chapter 298, Acts of Assembly of Virginia, 1952, was a valid exercise of the police power of the State; that it was not violative of the Constitution of the United States; that the preliminary injunction should be dissolved and the complainants' bill dismissed; and that, upon presentation of a proper decree, the same would be entered. A copy of this letter is attached hereto as Appendix A.

On September 16, 1952, the Circuit Court of the City of Richmond entered its final decree dissolving the preliminary injunction and dismissing the bill, but the execution of the same was stayed in order that the complainant could apply for an appeal to the Supreme Court of Appeals.

By the Assignments of Errors taken by the complainant, Cavalier Vending Corporation, and by Eric Reisfeld, one of the parties similarly situated to the complainant and who entered his appearance in the proceedings, the Federal questions were duly presented to the Supreme Court of Appeals of Virginia (See pages 14-16 of the printed record in that Court) where they were fully argued in the briefs and oral argument. The Supreme Court of Appeals of Virginia in its opinion handed down on January 25, 1954, reported in Advance Sheet No. 4 to Volume 195 of the Virginia Reports at page 626, a copy of which is attached hereto as Appendix B, affirmed the decree of the Circuit Court of the City of Richmond, and in so doing, expressly sustained the validity of Chapter 298 of the Acts of Assembly of Virginia, 1952, as a valid exercise of the police power of the State of Virginia, and as not being in contravention of the Equal Protec-

tion Clause of Section I of the Fourteenth Amendment of the Constitution of the United States.

V

The Federal Questions Involved are Substantial

In order to appreciate the significance of the Federal questions presented by this appeal, it is first necessary to see clearly just what the statute here under attack does and does not do.

First, as to what the statute does not do: The statute does not prohibit the sale of devices or articles intended or having special utility for the prevention of venereal disease; it does not forbid the sale of such articles to minors or to unmarried persons; it does not prohibit the open display and sale of such articles or the sale of the same in secret. While the statute requires a permit to sell such articles from the State Board of Pharmacy, any pharmacy or any other retail outlet, other than those who merchandise such articles through vending machines, may apply for such permits and the Board *is required to issue* the same. No standards are prescribed by the Act as to the qualification, either with respect to character, location, nature of the retail business conducted, or otherwise for the persons to whom permits are to be issued. No regulations whatever are provided with respect to the manner in which such articles are to be sold, except that they shall not be sold through vending machines.

Second, as to what the statute does do: the statute authorizes the State Board of Pharmacy to establish minimum standards of quality for such devices which standards shall be such as will tend to reduce the likelihood of contracting a venereal disease. No question is raised as to the validity of that provision. The other effect, and the only other effect, of the statute is to preclude those engaged in vending merchandise by means of automatic vending machines from

selling, distributing, or disposing of the articles mentioned in the statute through their automatic machines. The sale by those merchants using vending machines is absolutely prohibited and their equipment is made subject to seizure and destruction although, as pointed out above, all other merchants not using vending machines are permitted to sell, without restriction, the articles in question to anyone and in any manner and by any means. Merchants doing business by means of automatic vending machines are precluded from selling such articles, regardless of whether the merchandise distributed by them meets any standards of quality prescribed by the State Board of Pharmacy or otherwise. They are likewise prohibited from selling such articles regardless of whether their vending machines are placed in public places or places of business so that sales made through the same would be open for anyone to see or whether they are located in such places that the purchasers could make their purchases privately and discreetly. In short, regardless of the manner of display and sale that might be chosen by the operators of vending machines for the conduct of their business they are forbidden to sell the articles in question while those not doing business by means of vending machines are free to sell such articles however they may choose to operate.

Whether or not a state in the exercise of its police power to protect the health and morals of its citizens could or could not constitutionally prohibit the sale of articles intended or having special utility for the prevention of venereal disease; or whether it could prohibit the sale of the same to minors or others; or whether it could so regulate the sale of the same so as to prohibit the open display or sale of such articles, or to require that they be made openly or in private is not the question here. For neither the statute, the validity of which is here brought in question, nor any other statute of the State of Virginia, does any of those things.

The question here is whether a state may prohibit under any and all circumstances the sale of the articles in question by those engaged in the business of merchandising through the means of vending machines while at the same time permitting the sale of such articles under any and all circumstances by others.

The decision of the Supreme Court of Appeals of Virginia sustaining the validity of Chapter 298 of the Acts of Assembly of Virginia, 1952 (Section 18-89.1 of the Code of Virginia) and holding that that statutory provision does not violate the Due Process Clause and the Equal Protection Clause of Section 1 of the Fourteenth Amendment to the Constitution of the United States presents a Federal question of substance which was decided by that Court in a way which conflicts with applicable decisions of this Court defining the limitations of due process and the requirements of the Equal Protection Clause of the Federal Constitution.

Skinner v. *Oklahoma*, 316 U. S. 535;
Mayflower Farms, Inc. v. *Ten Eych*, 297 U. S. 266;
Smith v. *Cahoon*, 283 U. S. 553;
Cotting v. *Goddard*, 183 U. S. 79;
Gulf, C. & S. F. Ry. Co. v. *Ellis*, 165 U. S. 155;
Truax v. *Corrigan*, 257 U. S. 312;
Louis K. Liggett Co. v. *Baldridge*, 278 U. S. 105.

The vice of the statute is that it has singled out those conducting business in a certain manner and has imposed restraints upon them which are not imposed upon others engaged in the identical business but who operate in a different manner while the restraints imposed have no reasonable basis related to the differences in manner of operations of those upon whom the restraints operate.

Both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment require that laws enacted by the states shall operate upon all alike and shall not

subject individuals or groups of individuals to the arbitrary exercise of powers of government unrestrained by the established principles of private right and distributive justice. While the states have the right to classify the subjects to be brought within the scope of their legislative enactments, the law should operate equally upon all persons who come within the class to be effected and should embrace all persons who are in like situation and circumstances. The designation of the class should not be capricious or arbitrary, but should be based upon real distinctions having a proper relation to the ends sought to be accomplished. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 579; *Maxwell* v. *Dow*, 176 U. S. 581; *Caldwell* v. *Texas*, 137 U. S. 692.

The Due Process Clause was invoked at one time to strike down state laws, neither discriminatory nor arbitrary in their application to special groups, on the grounds that the statutes in question were not considered as having any relation to the health, welfare, safety or morals of the citizens or other subject properly within the scope of the police power of the state. See *Allgeyer* v. *Louisiana*, 165 U. S. 578; *Lochner* v. *New York*, 198 U. S. 45; *Adair* v. *United States*, 208 U. S. 161; and *Coppage* v. *Kansas*, 236 U. S. 1. While the Court no longer adheres to such a broad view of the Due Process Clause (cf. *Olsen* v. *Nebraska*, 313 U. S. 236; *Lincoln Federal Labor Union* v. *Northwestern I. & M. Co.*, 325 U. S. 525; and *Daniel* v. *Family Security Life Insurance Company*, 336 U. S. 220), there is no indication that the Court has abandoned the fundamental concept that the laws should operate equally upon all in like situation and circumstances. That principle, embodied within the concept of Due Process of Law and specifically guaranteed by the Equal Protection Clause, which forbids discriminating laws that arbitrarily impose restrictions upon some while leaving others free of such restrictions, remains untouched. *Nebbia* v. *New York*, 291 U. S. 502.

Whether the Due Process Clause or the Equal Protection Clause be invoked in such cases (see concurring opinion of Mr. Justice Jackson in *Railway Express Agency* v. *New York*, 336 U. S. 110) may or may not be important. The principle is the same. Even in the cases cited above in which the application of the Due Process Clause was more strictly limited it was recognized that a state, in legislating against what it may believe to be injurious practices cannot enact laws which run afoul of some other more specific federal constitutional prohibition.

There can be no question that the statute here under attack applies differently to those engaged in the business of selling articles or devices having special utility for the prevention of venereal disease and discriminates against those selling such items through vending machines, despite the assertion in the opinion of the Court below that it applies to all persons alike. That assertion overlooks a fact of common knowledge, namely that the distribution of goods by means of vending machines has become an established means of merchandising many items of commerce. As shown by the bill of complaint, that is the business of the appellants and others. It does the appellants little good to tell them they are not discriminated against because they can give up their established business thus taking themselves out of the restricted class, and engage in another type of merchandising with others that are privileged under the statute to sell without restriction.

The real question here is whether there is any basis for singling out the sale of the devices in question by means of vending machines and prohibiting those engaged in the merchandising of such articles by that means from continuing what is otherwise treated under the law as a valid business. It is submitted that there is not.

The act purports to regulate the sale, distribution or other disposition of devices or articles intended or having special

utility for the prevention of venereal disease. In its operation, however, it prohibits those engaged in the business of placing, supplying, maintaining and selling such merchandise by means of automatic vending machines from making their sales anywhere and under any circumstances while permitting others from selling the same merchandise anywhere and under any circumstances. The sale by means of a vending machine is made by the insertion of a coin in the machine and the delivery of the merchandise by the machine itself. There has not been, and we submit that there cannot be suggested any evil in the actual mechanical operation of such machines, the only act actually prohibited by the statute, which would justify the singling out and classification of such method of merchandising for condemnation.

While a state may classify persons and objects for the purpose of legislation and pass laws applicable only to persons and objects within a designated class, the classification cannot be capricious or arbitrary but must rest upon material differences between the persons included and the persons excluded having an appropriate relation to the object of the legislation. *Skinner* v. *Oklahoma*, 316 U. S. 535; *Smith* v. *Cahoon*, 283 U. S. 553; *Mayflower Farms* v. *Ten Eych*, 297 U. S. 266; *Air-Way Electric Corp.* v. *Day*, 266 U. S. 71; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *Truax* v. *Corrigan*, 257 U. S. 312. In the last cited case the Court said at page 337:

> "• • • In adjusting legislation to the need of the people of a state, the legislature has a wide discretion, and it may be fully conceded that perfect uniformity of treatment of all persons is neither practical nor desirable, that classification of persons is constantly necessary, and that questions of proper classification are not free from difficulty. But we venture to think that not in any of the cases in this court has classification of persons of sound mind and full responsibility,

having no special relation to each other, in respect of remedial procedure for an admitted tort, been sustained. Classification must be reasonable. As was said in Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 155, 41 L. Ed. 668, 17 Sup. Ct. Rep. 255, classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.' As was said in Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 293, 42 L. Ed. 1037, 1042, 18 Sup. Ct. Rep. 594; 'The rule . . . (i. e., of the equality clause) is not a substitute for municipal law; it only prescribes that that law have the attribute of equality of operation, and equality of operation does not mean indiscriminate operation on persons merely as such, but on persons according to their relations.' The same principle is repeated and enforced in Southern R. Co. v. Greene, 216 U. S. 400, 417, 54 L. Ed. 536, 541, 30 Sup. Ct. Rep. 287, 17 Ann. Cas. 1247. 'While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things with respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis.' Classification is the most inveterate of our reasoning processes. We can scarcely think or speak without consciously or unconsciously exercising it. It must therefore obtain in and determine legislation; but it must regard real resemblances and real differences between things and persons and class them in accordance with their pertinence to the purpose in hand. * * *"

In an attempt to justify the classification made by the statute here under attack the court below said:

"When the Act here under consideration is examined in the light of reason we cannot say that it exceeds the constitutional authority vested in the legislature. It is a valid exercise of the police power of the

> Commonwealth and is in furtherance of the health and morals of the people. Where these devices are sold only by licensed retail outlets, as permitted by the Act, improper use will be discouraged. It may be reasonably assumed that the sale of such devices through vending machines placed in public rest rooms frequented by people of all ages might prove detrimental to morals, particularly of young people. It unnecessarily places before them a temptation fraught with great danger. Young people may be tempted to buy from this 'silent salesman' for immoral purposes, whereas they would not make such purchase from a clerk in a licensed retail outlet. Further, the vulgar display of these machines filled with their wares clearly has a tendency to shock the sensibilities of decent people who, of necessity, at times use public rest rooms."

The statute, however, does not prohibit the sale of the articles in question to minors; it does not prohibit the secret sale of the articles; it does not prohibit the open display of such articles or the openly solicited purchase and sale of the same. All of such acts are permitted by those merchandising the articles by means other than vending machines. But the statute does prohibit the mechanical sale, whether it be open or secluded and to all persons and under all circumstances.

If the statute had been designed to forbid the sale of the articles to minors it should have so provided and been made applicable to all sellers alike and not have left it to the mere personal whim of some as to whether they would or would not sell to such purchasers. If the statute had been designed to prohibit the secret purchase and sale of the articles it should have so provided and again been made applicable to all sellers alike. As it is, the statute prohibits the sale through vending machines whether such machines are placed in public rest rooms where the purchase may be made secretly (or discreetly, according to one's viewpoint)

or whether they are placed openly in business establishments so that the operators of the establishments could exercise control over those using them.

In any event, a statute which places a complete bar upon some and allows complete freedom to others does not afford the equal protection of the laws to all. A classification based upon the assumption that some will not engage in practices which, though not expressed in the legislation, are suggested as possible targets of the enactment is not a valid classification. In such case it would not be government by law, but government by the mere whim of the very individuals who are supposed to be regulated by the law.

Undoubtedly, regulation of the sale of articles or devices intended or having special utility for the prevention of venereal disease is within the police power of a state and a matter with which the state can deal in the exercise of its power to promote the public welfare, health and morals. If the state enacted regulations applicable to all alike forbidding the sale of such articles to minors or dealing with other practices in connection with the sale of such articles which might be deemed objectionable, it might even be that the state could treat vendors selling by means of automatic vending machines as a special class and prohibit them entirely from selling such merchandise as the only means of effectuating the desired regulations in their case. Cf. *Illinois Cigarette Service Co.* v. *Chicago*, 89 Fed. (2d) 610 (7th Cir.); *Markendorf* v. *Friedman*, 280 Ky. 484, 133 S. W. (2d) 516 (App. Dis. 306 U. S. 627).

In this case, however, the legislation does not declare the sale of the articles in question to be illegal; it does not forbid their sale to certain persons; it does not forbid their secret sale; it does not forbid their open sale. In fact it contains no regulations affecting the health, safety, welfare, or morals of the citizens of the state except that providing

that the State Board of Pharmacy may establish minimum standards of quality for such devices that will tend to reduce the likelihood of contracting a venereal disease, a requirement that can be met as well by vendors selling through automatic vending machines as by others who are permitted to sell without restriction.

With respect to the sale of the articles, the statute does nothing but prohibit the sale by mechanical vending machines. Unless the mere act of inserting a coin in the machines and receiving merchandise therefrom is a legitimate basis for the classification set up by the statute there is no proper basis for the distinction here made. While merchandising by means of vending machine may be a proper distinction for some purposes, such as taxation, it is submitted that it is wholly arbitrary and without foundations for the purpose of the statute here under attack and that the statute is invalid as denying the equal protection of the laws.

It is submitted that the Virginia Court in refusing to hold Chapter 298 of the Acts of Assembly of Virginia 1952 invalid because in contravention of the Fourteenth Amendment of the Constitution of the United States has decided a Federal question of substance in a way not in accord with the applicable principles established by prior decisions of this court concerning the requirements of the Due Process Clause and the Equal Protection of the Laws Clause of the Fourteenth Amendment.

It is therefore respectfully submitted that this Court has jurisdiction of this appeal by virtue of Section 1257 (2) of the Judicial Code and Judiciary (Title 28 U. S. C., Sec. 1257 (2), approved June 25, 1948).

Respectfully submitted,

WALTER E. ROGERS,
EDWARD P. SIMPKINS, JR.,
Counsel for Appellants.

EXHIBIT "A"

Opinion of Honorable Harold F. Snead, Judge of the Circuit Court of the City of Richmond

GENTLEMEN:

After due consideration of the complainant's bill for injunctive relief, the answer thereto of the defendants, the evidence heard *ore tenus*, the argument of and memoranda submitted by counsel, it is the judgment of the court that the enactment of Chapter 298, Acts of Assembly, 1952, was a valid exercise of the police power; that said chapter is not violative of the Constitution of Virginia or the Constitution of the United States; that the relief prayed for should be denied; that the preliminary injunction heretofore awarded should be dissolved and that the complainant's bill should be dismissed.

Upon presentation of a proper decree same will be entered.

Yours very truly,

HAROLD F. SNEAD, *Judge.*

s/s

Received and filed. Aug. 15th, 1952.

Teste:

WILBUR J. GRIGGS, *Clerk.*
By E. M. EDWARDS, *D. C.*

EXHIBIT "B"

IN THE SUPREME COURT OF APPEALS OF VIRGINIA

CAVALIER VENDING CORPORATION AND ERIC REISFELD

v.

THE STATE BOARD OF PHARMACY, et al.

Opinion by Justice Kennon C. Whittle, Richmond, Va., January 25, 1954.

Appeal from a Decree of the Circuit Court of the city of Richmond. Hon. Harold F. Snead, judge presiding.

Affirmed.

Cavalier Vending Corporation sought and obtained a temporary injunction against the State Board of Pharmacy,

restraining the Board from enforcing the provisions of Chapter 298, Acts of Assembly, 1952 (Code, § 18-89.1). After a hearing the court dissolved the injunction and dismissed the bill. The prayer of the bill having been for relief of 'all others engaged in like or similar business', Eric Reisfeld alleged that he was aggrieved by the decree dismissing the suit and therefore joined appellant, Cavalier Vending Corporation, in this appeal.

The bill prayed that the State Board be enjoined from enforcing the provisions of the Act upon the ground that it is in contravention of the equal protection clauses of the Constitutions of Virginia and the United States, and violates the prohibition against granting special privileges contained in the former, as well as the requirement that the object of an enactment be expressed in its title.

The Act under consideration reads:

"Chapter 298

"An Act to restrict the sale of certain commodities; to require certain permits and prescribe the fees therefor; to confer the rule making power upon the State Board of Pharmacy, and to impose upon it certain duties; to prohibit certain acts, provide penalties for violations and provide for the destruction of certain property; and to provide for the disposition of certain funds.

"Approved March 11, 1952

"Be it enacted by the General Assembly of Virginia:

"1. § 1. No drug, medicinal preparation, appliance, device or other article intended or having special utility for the prevention of venereal disease, hereinafter referred to as device, shall be sold or otherwise disposed of in this State except by duly licensed practitioners of medicine; and in pharmacies and retail outlets. Pharmacies and retail stores desiring to sell such devices shall apply in writing to the State Board of Pharmacy and the Board shall issue a permit for the sale thereof. Such devices may be sold by wholesalers regularly transacting business as such, but it shall be unlawful for any wholesaler to knowingly sell such devices to any unlicensed retailer.

"§ 2. The offering for sale, distribution or other disposition by means of a vending machine or other automatic machine of such devices is expressly prohibited.

"§ 3. Any such vending machine or other automatic machine shall be destroyed when found in violation hereof. Possession of such devices by any unlicensed retailer in his place of business shall be *prima facie* evidence of sale.

"§ 4. The State Board of Pharmacy shall enforce the terms of this Act and may establish minimum standards of quality for such devices which standards of quality shall be such as will tend to reduce the likelihood of contracting a venereal disease.

"§ 5. Any person who violates any of the provisions of this Act or regulation of the Board shall be guilty of a misdemeanor."

While the issues here involved are legal and not factual, two witnesses were introduced by the State Board for the purpose of showing that the Act would promote the health and morals of the community, and for the further purpose of demonstrating the method used in operating the vending machines, the use of which is sought to be prohibited.

R. R. Rooke testified that he had been a pharmacist since 1921; that he was a member of the Board of Health of the City of Richmond; that he had served as President of the Virginia Pharmaceutical Association; that as such he visited practically every drug store in Virginia; that so far as he knew the universal practice in retail outlets in regard to prophylactic rubber goods was that such goods were kept in a drawer out of sight, and sold only upon request; that he had never seen any display or advertisement of such goods except in professional journals; that sales are made in a discreet manner, male customers being served by male clerks; that the cartons containing the devices are dated so that the oldest may be first sold to assure fresh merchandise; that he had seen vending machines used in the sale of the devices in Richmond and in service stations on the highways, said machines being located in both men's and women's rest rooms. J. Curtis Nottingham, Secretary of the Virginia Pharmaceutical Association, corroborated Mr. Rooke in his testimony, and in addition stated that

indented in the metal on the vending machines were the words "Sold for Prevention of Disease Only", and stencilled on the machines were the words "Latex" and "Silver-Tex".

The assignments of error relied upon raise the constitutional questions previously stated and will be considered generally in the order listed. In the main they are presented by appellants in the form of two questions, the first being:

"(A) In view of the provisions of Section 52 of the Constitution of Virginia, can an act of the Legislature having a title so vague as to give no notice whatsoever of its contents be valid?"

The relevant part of Section 52 of the Constitution of Virginia reads: "No law shall embrace more than one object which shall be expressed in its title; * * *". The objection presented here is that the title to the Act under review is vague and its object is not "expressed in its title". The point so raised has been presented to this court on many occasions. See annotations to Section 52 of the Constitution of Virginia, Vol. 9, Code, 1950, pp. 462-464.

Conceding that the title to the Act is subject to criticism, it is not so defective as to render the enactment void. We have repeatedly held that the purpose of the constitutional provision (§ 52) was to prevent the members of the legislature and the people from being misled. The primary purpose of the section was to prevent the employment of deceptive titles which would conceal rather than reveal the character of the legislation, and to prohibit the bringing together into one bill subjects diverse and dissimilar in nature and having no kindred connection; to prevent surprise or fraud in legislation by inserting provisions in the act of which the title gives no intimation. It was not the intention of the section to obstruct honest legislation and it was not designed to embarrass legislation by requiring that the caption of an act state its full purpose as completely as the act itself. *Commonwealth* v. *Brown*, 91 Va. 762, 771, 21 S. E. 357, 360, 28 L.R.A. 110; *Dickens* v. *Radford-Willis, etc. R. Co.*, 121 Va. 353, 357, 93 S. E. 625.

Where there is doubt as to the sufficiency of a statutory title, to meet the requirement of Section 52, such doubt must be resolved in favor of its sufficiency, as courts will not declare an act of the legislature unconstitutional unless its unconstitutionality is plain. *Commonwealth* v. *C. & O. R. Co.*, 118 Va. 261, 87 S. E. 622; *Commonwealth* v. *Dodson*, 176 Va. 281, 11 S. E. (2d) 120.

The title to Chapter 298 gave notice that the Act restricted "the sale of certain commodities"; required "certain permits" and prescribed "fees therefor"; conferred "rule making power upon the State Board of Pharmacy", and imposed upon the Board "certain duties"; prohibited certain acts and provided penalties for violation; and that it provided for the destruction of certain property and for the disposition of certain funds.

While the title is general, it is evident that the Act relates to the regulation of the sale of certain commodities. We said in *Powell* v. *Supervisors of Brunswick County*, 88 Va. 707, 714, 14 S. E. 543, "The generality of a title is no objection to it, so long as it is not made a cover for legislation incongruous in itself, and which, by no fair intendment, can be considered as having a necessary or proper connection." And we held in *Fidelity Insurance Co.* v. *S. V. R. Co.*, 86 Va. 1, 6, 9 S. E. 759, "When the title is general, as it may be, all persons interested are put upon inquiry as to anything in the body of the act which is germane to the subject expressed."

We hold therefore that the subjects embraced in the statute which are not specified in the title are congruous to and have a natural connection with the subject expressed in the title, thus making the title to the Act free from the fault asserted.

The next question presented under the assignments of error is:

"(B) In view of the equal protection clause of the Federal Constitution and that of the Virginia Constitution, as well as the prohibition in the Virginia Constitution against granting special privileges, may the Legislature of Virginia require a privilege license for a trade, which neither historically nor by statute is other than the sale of an ordinary

commodity which may be engaged in as of common right and then declare, not in the exercise of the police power in furtherance of some fixed policy of the State, that one class of person shall be ineligible to procure such license?"

Appellants argue that the Act is in violation of the declared public policy of Virginia to prevent the spread of venereal disease and that it denies them the right to engage in a lawful business in furtherance of this declared public policy while granting such privilege to others. They concede that this argument is unavailing if the Act is passed pursuant to a valid exercise of the police power of the Commonwealth. *Miller* v. *State Entomologist*, 146 Va. 175, 135 S. E. 813; affirmed in *Miller* v. *Schoene*, 48 S. Ct. 246, 276 U. S. 272, 72 L. ed. 568. Appellants contend that the passage of the Act was not a valid exercise of the police power of the State. We now give this contention consideration.

It is said in 11 Am. Jur., Constitutional Law, § 245, pp. 966, 967, 968, 969: "The police power is an attribute * * * of every civilized government. * * * Consequently it is inherent in the States of the American Union, possessed by every one of them as sovereign, and is not a grant derived from or under any written constitution. * * * (P)olice power is a grant from the people to their governmental agents. * * *"

It is well settled by many decisions dealing with widely varied subjects that the police power extends to the enactment of laws which promote the public welfare, health and morals of the citizens. *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379, 81 L. ed. 703, 57 S. Ct. 578, 108 A. L. R. 1330. The police power is not susceptible of circumstantial precision because it is impossible to foresee changing conditions which may call for its exercise. *Des Moines* v. *Manhattan Oil Co.*, 193 Iowa 1096, 184 N. W. 823, 23 A. L. R. 1322.

Clearly, commodities of such a nature as tend to engender vice, indecency and social corruption are within regulatory scope of the police power. Such are not "ordinary commodities" as contended by appellants. (See Annotation, L. R. A. 1917B, 1078) Acts passed for the purpose of attempting to secure public order, decency, and morals are not violative of the rights of persons and property contained in

the Federal and State constitutions. *L'Hote* v. *New Orleans*, 177 U. S. 587, 44 L. ed. 899, 20 S. Ct. 788.

When the Act here under consideration is examined in the light of reason we cannot say that it exceeds the constitutional authority vested in the legislature. It is a valid exercise of the police power of the Commonwealth and is in furtherance of the health and morals of the people. Where these devices are sold only by licensed retail outlets, as permitted by the Act, improper use will be discouraged. It may be reasonably assumed that the sale of such devices through vending machines placed in public rest rooms frequented by people of all ages might prove detrimental to morals, particularly of young people. It unnecessarily places before them a temptation fraught with great danger. Young people may be tempted to buy from this "silent salesman" for immoral purposes, whereas they would not make such purchase from a clerk in a licensed retail outlet. Further, the vulgar display of these machines filled with their wares clearly has a tendency to shock the sensibilities of decent people who, of necessity, at times use public rest rooms.

One does not have to inquire as to the motives for this legislation. The reasons for its passage are obscure only to those who do not care to see.

But it will be observed that the Act does not prohibit the sale of the devices. All licensed pharmacies and retail stores can sell them. Thus appellants' argument that the legislation "is simply an Act to stifle competition" is untenable. The State is not attempting to prohibit the sale of these devices; it is simply exercising its constitutional right to regulate their sale.

It is argued by appellants that the Act is not constitutional because it imposes restrictions on a lawful business which do not operate equally upon all persons pursuing the same business under the same circumstances. The business here sought to be regulated, as heretofore stated, directly affects public morals and health and is therefore subject to strict surveillance. Appellants have failed to show that the regulations imposed discriminate against them. There is nothing in the statute which prevents appellants from selling the

devices. They are at liberty to comply with the regulatory terms of the Act and sell them. They are simply prohibited, like all other persons, from selling them through vending machines. Thus there is no denial of the equal protection of the law.

"The Fourteenth Amendment to the Constitution of the United States does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed." *Hayes* v. *Missouri*, 120 U. S. 68, 7 S. Ct. 350, 30 L.ed. 578; *Buck* v. *Bell*, 143 Va. 310, 321, 130 S. E. 516, 47 S. Ct. 584, 274 U. S. 200, 71 L. ed. 1000. Since Chapter 298 meets this test, we are of the opinion that the classification which it establishes is not arbitrary. It is based on reasoning which we have no right to challenge. Unless the classification in the Act is arbitrary and unreasonable it cannot be successfully attacked. *V. E. & P. Co.* v. *Commonwealth*, 169 Va. 688, 194 S. E. 775.

For the reasons here expressed the decree appealed from is *Affirmed.*

Hudgins, C. J.; Spratley and Miller, J. J., Dissenting

Miller, *J.*, dissenting:

The object of Chapter 298, Acts of 1952, page 389, is to restrict and regulate disposition of drugs, preparations or articles intended to prevent venereal disease or conception. By forbidding their sale in vending machines, the act prevents such clandestine and easy acquisition as might tend to encourage their promiscuous use. Thus the underlying and dominant purpose behind the legislation is to protect public health and morals.

The mandatory and explicit language of section 52 of the Constitution of Virginia is that "No law shall embrace more than one object, which shall be expressed in its title; * * *." Yet notwithstanding that emphatic language, the title of this act really expresses no object. The vague and illusive declaration in the title that it is "An act to restrain the

sale of certain commodities; to require certain permits, * * *" and "to confer the rule making power upon the State Board of Pharmacy, * * *" and other like assertions, conveys no intelligible information to the reader. Those words and phrases constitute mere language without meaning. The title certainly fails to appraise anyone of the object, purpose, intent or subject of the legislation. At no place in the title is there found the slightest reference to the true purpose of the act. There is no mention or indication that the act has to do with prophylactics, drugs, contraceptives, venereal disease, or the use of vending machines as a means of selling any goods. Nor does the title even indicate that the act is to protect public health or morals.

The purpose of constitutional provisions such as that embodied in section 52 is to prevent the legislators and the public from being misled, and to apprise them of the subject matter of the proposed legislation.

"* * * The dominant objective of the provision is to insure the titling of legislative acts in a manner that will give reasonable notice of the purview to the members of the assembly, and to the public. * * *" 1 Sutherland: Statutory Construction, sec. 1702, p. 287.

"* * * The aim of the constitutional provision is to give information as to the subject of legislation with which the act deals, to apprise the members of the legislature, and the people, of the subject of legislation under consideration, or to challenge the attention of those affected by the act to its provisions, so that they may have an opportunity of being heard thereon if they so desire." 50 Am. Jur., Statutes, sec. 166, p. 146.

"* * * It has therefore been held that the title is sufficient if it is not productive of surprise and fraud, and is not calculated to mislead the legislature or the people, but is of such character as fairly to apprise legislators, and the public in general, of the subject matter of the legislation, and of the interests that are or may be affected thereby, and to put any one having an interest in the subject matter on inquiry." 50 Am. Jur., Statutes, sec. 167, p. 147.

"* * * While it may be difficult to formulate a rule by which to determine the extent to which the title of a bill

must specialize its object, it may be safely assumed that the title must not only embrace the subject of proposed legislation, but also express it clearly and fully enough to give notice of the legislative purpose. * * *" 50 Am. Jur., Statutes, sec. 181, p. 161.

"While the title of a statute need not be an index to, or a synopsis of its contents, it must set forth the subject of the statute with sufficient clearness to give notice of the legislative intent and purpose to those interested in, or affected by, the statute." 82 C. J. S., Statutes, sec. 219, p. 364.

In 1889 when construing and stating the purpose of Article V, section 15, of our then Constitution, which embodied the same language as section 52 of our present Constitution, this court said:

"As to the constitutional provision in question, it is, as we have had occasion in a recent case to declare, not only mandatory, but of great public utility. It was introduced into the constitution for a wise purpose, and ought to be reasonably interpreted and firmly enforced. One of its objects is to prevent corrupt or surreptitious legislation by incorporating into a bill obnoxious provisions of which the title gives no indication, and its requirement is that the title, while it need not be a complete index of the act, must indicate its object with sufficient distinctness *to enable the members of the legislature to fairly understand it by simply hearing the title read.* In other words, the title is not to be used as a deceptive cover for vicious legislation." *Fidelity Insurance, etc., Co., et al.* v. *Shenandoah Valley Railroad Co., et al.*, 86 Va. 1, 5, 9 S. E. 759.

The title now in question gives no notice to the public of the general subject dealt with, nor does it afford notice to the interests likely to be affected by the legislation. No member of the legislature could obtain the faintest idea of the object, purpose or contents of the act by reading the title.

Our constitutional provision does not merely require that only one object be "embraced" in the law, but it also requires that the object be "expressed" in the title. That, I take it, means that the title must fairly state the subject

or include provisions related to the object or purpose of the act.

"* * * It is sufficient if the title fairly expresses the subject, or is sufficiently comprehensive to include the several provisions relating to or connected with that subject." *Westgate* v. *Township of Adrian*, 161 Mich. 333, 335, 126 N. W. 422, cited with approval in *Southern Railway Co.* v. *Russell*, 133 Va. 292, 303, 112 S. E. 700.

The majority opinion asserts that "While the title is general, it is evident that the Act relates to the regulation of the sale of certain commodities." That is undoubtedly true. Yet the opinion, like the title, fails to tell me what object is *expressed* in the title, or to say how one may, by reading the title, be advised of the subject of the legislation.

"If a title totally fails to express the subject of an act, or if a title is misleading, the entire act is invalid. * * *" 1 Sutherland: Statutory Construction, sec. 1708, p. 298.

Profit might be had from perusal of the title to a quite similar act passed some years ago in Kentucky and discussed in *Markendorf* v. *Friedman*, 280 Ky. 484, 133 S. W. (2d) 516. The title is:

"An Act relating to the sale, control and licensing of the sale of appliances, drugs and mechanical preparations intended or having special utility for the prevention of venereal diseases." Kentucky Acts, 1938, C. 55, p. 387.

It may be true that the title to our act is not subject to the charge that it constitutes a cover for surreptitious legislation, for it really indicates nothing. The only thing that can be said in defense of the title is that its total lack of a stated object, subject or purpose might arouse one's curiosity to read the act and thus obtain the information that the Constitution says shall be given him in the title. Yet the possibility of arousing idle curiosity by failure to state or express the object is not compliance with the constitutional provision.

The fallacy that I find inherent in the majority opinion is that it does not recognize the distinction between what is meant by "embrace" and "expressed".

The distinction in the meaning and effect of these words as used in a similar constitutional provision is clearly set out in *Mayor, etc. of Jersey City* v. *Speer*, 78 N. J. Law 34, 42, 72 A. 448, 451, affirmed in 79 N. J. Law 598, 76 A. 1037:

"* * * The requirement as to its title is that the object of every act shall be 'expressed' therein, which is a very different matter from its being 'embraced' thereby, as has been frequently pointed out in our cases.

" 'It is not enough,' said Beasley, C. J., in *Rader* v. *Union Tp. Committee*, 39 N. J. Law, 509, 'that it (a title) embraces the legislative purpose. It must express it.' 'To confound what the title of an act expresses with what it embraces is to nullify the mandate of the Constitution.' *Griffith* v. *Trenton* (N. J. Sup.), 60 Atl. 29.

" 'It has been thoroughly settled,' said Chancellor Magie in *State* v. *Twining*, 73 N. J. Law, 683, 64 Atl. 1073, 1135, 'by repeated decisions of our courts, including the court of last resort, that to accord with this constitutional provision the title of every act must not only include, but must also express, its object.' "

Nothing stated in this title is indicative of or germane to the object, purpose, or contents of the body of the act, and thus it fails to meet the requirements of the Constitution.

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HAROLD B. WILLEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 771

CAVALIER VENDING CORPORATION, FOR ITSELF AND ON BEHALF OF OTHERS ENGAGED IN LIKE OR SIMILAR BUSINESS WITHIN THE COMMONWEALTH OF VIRGINIA, AND ERIC REISFELD,

Appellants,

vs.

THE STATE BOARD OF PHARMACY, A PUBLIC CORPORATION COMPOSED OF OFFICERS OF GOVERNMENT AND ITS OFFICERS, AGENTS, SERVANTS, EMPLOYEES AND ALL LAW ENFORCEMENT OFFICERS AND AGENTS ACTING UNDER ITS DIRECTION, ET. AL.

APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

J. LINDSAY ALMOND JR.,
Attorney General of the Commonwealth of Virginia,
FREDERICK T. GRAY,
Assistant Attorney General of the Commonwealth of Virginia,
Counsel for Appellees.

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SUPREME COURT OF THE UNITED STATES

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No. 771

CAVALIER VENDING CORPORATION, ETC., ET AL, *Appellants*,

v.

THE STATE BOARD OF PHARMACY, ETC., ET AL

APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA

STATEMENT OF APPELLEE OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

The appellees, believing that the matters set forth herein will demonstrate the lack of substance in the questions presented by this appeal, file this statement in opposition to the appellants' statement as to jurisdiction. The appellees include herein their motion to dismiss the appeal, or, in the alternative, to affirm the judgment of the Supreme Court of Appeals of Virginia on the ground that the question raised on behalf of the appellant is so unsubstantial as not to need further argument. The matters here relied upon are more particularly stated below.

I

The State Statute Involved and the Nature of the Case

A. *The Statute*

The appellants contend that Chapter 298, Acts of Assembly of Virginia, 1952, which has been codified as § 18-89.1 of the Code of Virginia, is invalid under the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment.

The statute reads as follows:

"Chapter 298

"An Act to restrict the sale of certain commodities; to require certain permits and prescribe the fees therefor; to confer the rule making power upon the State Board of Pharmacy, and to impose upon it certain duties; to prohibit certain acts, provide penalties for violations and provide for the destruction of certain property; and to provide for the disposition of certain funds.

"Approved March 11, 1952

"Be it enacted by the General Assembly of Virginia;

"1. § 1. No drug, medicinal preparation, appliance, device or other article intended or having special utility for the prevention of venereal disease, hereinafter referred to as device, shall be sold or otherwise disposed of in this State except by duly licensed practitioners of medicine; and in pharmacies and retail outlets. Pharmacies and retail stores desiring to sell such devices shall apply in writing to the State Board of Pharmacy and the Board shall issue a permit for the sale thereof. Such devices may be sold by wholesalers regularly transacting business as such, but it shall be unlawful for any wholesaler to knowingly sell such devices to any unlicensed retailer.

"§ 2. The offering for sale, distribution or other disposition by means of a vending machine or other

automatic machine of such devices is expressly prohibited.

"§ 3. Any such vending machine or other automatic machine shall be destroyed when found in violation hereof. Possession of such devices by any unlicensed retailer in his place of business shall be prima facie evidence of sale.

"§ 4. The State Board of Pharmacy shall enforce the terms of this Act and may establish minimum standards of quality for such devices which standards of quality shall be such as will tend to reduce the likelihood of contracting a venereal disease.

"§ 5. Any person who violates any of the provisions of this Act or regulation of the Board shall be guilty of a misdemeanor."

B. *The Process Below*

This case arose upon a bill for injunction filed in the Circuit Court of the City of Richmond on May 27, 1952. On June 23, 1952 that Court issued a preliminary injunction. After hearing the matter the judge of that Court, on August 15, 1952, advised that, in his judgment, the Act did not violate the Constitution of the United States or the Constitution of the State of Virginia (a question as to the sufficiency of the title of the Act was raised below but is not material to this appeal), and on September 16, 1952 a final decree dissolving the injunction and dismissing the bill was entered.

The Cavalier Vending Corporation and Eric Reisfeld applied for a writ of error to the Supreme Court of Appeals of Virginia. The writ of error was granted and, on January 25, 1954, the Supreme Court of Appeals of Virginia affirmed the judgment of the Circuit Court of the City of Richmond. Three of the Justices dissented but solely on the question of the sufficiency of the title to the Act which is not here involved.

The opinion is reported in 195 Va. 626 (Advance Sheets, No. 4).

C. *Statement of the Case*

The appellants are engaged in the business of selling through the medium of coin-operated vending machines prophylactic rubber merchandise having special utility for the prevention of venereal disease. Although on page 5 of the Statement as to Jurisdiction it is said that the devices were "for sale to male persons" the evidence disclosed that they were located in both men's and women's rest rooms.

The Act involved prohibits sale of such devices through such machines by any person, and the appellants contend that singling out their particular method of doing business is unreasonable and denies them due process and equal protection of law.

D. *The Question Presented*

The question presented, therefore, is whether Chapter 298, Acts of Assembly, 1952, violates either the Due Process or Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution.

Argument

The appellants have sought to show that the Federal questions are substantial by telling the Court "Clearly just what the statute here under attack does and does not do." In that connection they say:

> "The statute does not prohibit the sale of devices or articles intended or having special utility for the prevention of venereal disease; it does not forbid the sale of such articles to minors or to unmarried persons; it does not prohibit the open display and sale of such articles or the sale of the same in secret. While the statute requires a permit to sell such articles from the State Board of Pharmacy, any pharmacy or any other retail outlet, other than those who merchandise such

articles through vending machines, may apply for such permits and the Board *is required to issue* the same. No standards are prescribed by the Act as to the qualification, either with respect to character, location, nature of the retail business conducted, or otherwise for the persons to whom permits are to be issued. No regulations whatever are provided with respect to the manner in which such articles are to be sold, except that they shall not be sold through vending machines." (Statement as to jurisdiction, p. 9)

What the appellants did not tell the Court is that the evidence in this case clearly established that the universal practice in retail outlets in Virginia is for prophylactic rubber goods to be kept in a drawer out of sight and sold only upon request. Witnesses with years of experience in the field testified that they had never seen any display of such goods or any consumer advertisement of such goods.

The appellants complain that the statute does not prohibit others from openly displaying and selling such goods or from making a secret sale of such goods. We reply that when such legislation becomes necessary it may be provided, but as of this date the only type operation that uses display and secret sale is the vending machine operation.

The appellants frankly admit that the regulation of the sale of such articles is within the police power (Statement as to jurisdiction, p. 17). But they argue that this regulation is invalid because it discriminates against them and that there is no basis for such discrimination.

The appellees answered that contention below, and the Supreme Court of Appeals of Virginia agreed that the classification, if it be such, is justified by the facts.

The devices here under consideration are those designed for or having special utility for the prevention of venereal disease. In other words, they are designed to protect those who engage in unlawful intercourse from such diseases.

There can certainly be no question that unlawful intercourse is contrary to good morals, hence, if this Act will in any way help prevent such intercourse it is in aid of the public morals. It would seem obvious that the Legislature could prohibit the sale of such devices entirely as that would tend to reduce immorality. The greater includes the lesser—if they can bar entirely, then surely, in so far as the police power is concerned, they can bar partially. But the Legislature has, we submit, faced this problem realistically and has adopted not only legislation which it is within its power to adopt, but wise legislation.

The presence of these machines in public places—men's and women's toilets—marked as they are to make known to the public their function and purpose is an invitation to the public at large to violate the law and engage in unlawful intercourse. The power of advertising and the power of suggestion are such that these machines tend or may tend to stimulate such unlawful intercourse. It is offensive to good morals that such devices be displayed—flaunted in very faces of our people, especially the youngsters of teen age and the women. Certainly no one would argue that it is not detrimental to public morals to print obscene matter in such places and it can hardly be argued that this display of and offer to sell devices designed for a highly immoral purpose is less offensive.

Indeed it would appear that the wording on these machines—which is necessary to their operation—is in violation of the spirit if not the letter of § 32-103 which reads as follows:

> "It shall be unlawful for any person, firm, corporation or association, except boards of health or agencies approved by the State Board of Health, to post or otherwise exhibit or distribute in any manner whatsoeven *in any place any advertisement or other printed matter concerning venereal diseases*, lost manhood, lost vitality, impotency, seminal emissions, self-abuse,

varicocele or excessive sexual indulgence, and calling attention to any medicine or preparation that may be used therefor.

"For each and every violation of this section the defendant upon conviction shall be fined not less than ten dollars nor more than one hundred dollars." (Italics added)

One can readily imagine situations in which young children, tempted as they are by the lure of any coin operated device, would procure such devices and be led to inquire of their purpose in company where such advice would be given in a manner highly detrimental to the future well being of the child.

It seems to the appellees that the Legislature has weighed certain factors in adopting this Act and has sought to protect the public health and morals in a field in which those two considerations come in conflict with each other.

There would seem to be four things which might prevent a person, particularly a child, from engaging in unlawful and immoral intercourse:

(1) Character
(2) Fear of venereal disease
(3) Fear of pregnancy
(4) Fear of detection by parents or officers

Those persons who would be deterred by item (1) need not concern us here for neither their health nor their morals are in jeopardy, however, it might well be argued that the lure which the presence of these machines might have could be the difference between having enough character to resist temptation and succumbing to temptation.

Items (2) and (3) are fears which could be brought most fully into play on the side of morality by banning the sale of such devices altogether, but to do so would be to expose those who nevertheless engaged in unlawful inter-

course to the perils of disease and would increase the incidence of illegitimacy. Therefore, the Legislature has not seen fit to ban these devices entirely for it has concluded that illegitimacy and venereal disease should be prevented in spite of the fact that it makes immorality easier.

Item (4), however, can be furthered by preventing sales by vending machines. Purchases through vending machines can be made in complete privacy. Fear of detection is, therefore, materially less than if an open sale were required. We submit, therefore, that denial of such sales is in the interest of public morals.

Consider for a moment the young man who feels the desire to engage in unlawful intercourse but who has been told the dangers of disease. This young man is proud of his reputation and would be ashamed to openly purchase the device which would protect him and without them he will not engage in such acts. Can it be seriously contended that this law, which takes away his opportunity to secretly equip himself, does not in any way promote public morals? And, if the existence of this law will tend to prevent immorality, will it not also prevent disease? The use of such devices is not a "fool-proof" preventive. The healthiest course is to refrain from such acts. We sincerely submit that the law is in the interest of both health and morals.

We have introduced evidence to show that the sale of such devices in usual retail outlets is done in a discreet manner without display or advertising. The Legislature is aware of that practice, and the appellees submit that the Legislature has believed such is the best method of sale.

By that method the devices in question can be procured by those who would defy the laws and engage in unlawful intercourse without the necessary publicity and advertising present through vending machines and without affording a means of secret purchase. The secrecy aspect should not be lightly regarded. Those who would violate the

law hate the light of scrutiny. There would be more shootings if fireams were not registered and more poisonings if sales were not recorded. The requirement of open purchase is a great moral factor.

The appellee also introduced evidence to prove that the sale of such devices in retail outlets is supervised in such a manner as to provide "fresh" merchandise. Obviously, this is done because the retailer wants to avoid complaints from merchandise which has failed to perform properly. This desire will operate to protect the public health by providing high quality devices. The vending machine operator is not concerned as vitally in this respect as the retailer, for he will not have to face the public to meet the complaint. Nor will a dissatisfied customer be lost for sales of other merchandise as he will in the case of the retailer. The prevention of such "absentee salesmen" will, in the opinion of the appellees, tend to insure higher quality merchandise and proper supervision to prevent deterioration by age.

For these considerations of morality and health it is submitted that this Act is immune from the attacks made against it and is a valid exercise of the police power. The Act comes within the rule laid down in *Barbier* v. *Connolly*, 113 U. S. 27, 5 S. Ct. 357, 28 L. Ed. 923, where, in referring to the effect of the fourteenth amendment to the Federal Constitution, the Court said:

> "But neither the amendment, broad and comprehensive as it is, nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity." (143 Va. 319-20)

The Supreme Court of Appeals of Virginia agreed with that reasoning in these words:

"When the Act here under consideration is examined in the light of reason we cannot say that it exceeds the constitutional authority vested in the legislature. It is a valid exercise of the police power of the Commonwealth and is in furtherance of the health and morals of the people. Where these devices are sold only by licensed retail outlets, as permitted by the Act improper use will be discouraged. It may be reasonably assumed that the sale of such devices through vending machines placed in public rest rooms frequented by people of all ages might prove detrimental to morals, particularly of young people. It unnecessarily places before them a temptation fraught with great danger. Young people may be tempted to buy from this 'silent salesman' for immoral purposes, whereas they would not make such purchase from a clerk in a licensed retail outlet. Further, the vulgar display of these machines filled with their wares clearly has a tendency to shock the sensibilities of decent people who, of necessity, at times use public rest rooms.

"One does not have to inquire as to the motives for this legislation. The reasons for its passage are obscure only to those who do not care to see.

"But it will be observed that the Act does not prohibit the sale of the devices. All licensed pharmacies and retail stores can sell them. Thus appellants' argument that the legislation 'is simply an Act to stifle competition' is untenable. The State is not attempting to prohibit the sale of these devices; it is simply exercising its constitutional right to regulate their sale.

"It is argued by appellants that the Act is not constitutional because it imposes restrictions on a lawful business which do not operate equally upon all persons pursuing the same business under the same circumstances. The business here sought to be regulated, as heretofore stated, directly affects public morals and health and is therefore subject to strict surveillance. Appellants have failed to show that the regulations imposed discriminate against them. There is nothing in the statute which prevents appellants from selling the devices. They are at liberty to comply with the regu-

latory terms of the Act and sell them. They are simply prohibited, like all other persons, from selling them through vending machines. Thus there is no denial of the equal protection of the law.

"'The Fourteenth Amendment to the Constitution of the United States does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed.' *Hayes* v. *Missouri*, 120 U. S. 68, 7 S. Ct. 350, 30 L. Ed. 578; *Buck* v. *Bell*, 143 Va. 310, 321, 130 S. E. 516, 47 S. Ct. 584, 274 U. S. 200, 71 L. Ed. 1000. Since Chapter 298 meets this test, we are of the opinion that the classification which it establishes is not arbitrary. It is based on reasoning which we have no right to challenge. Unless the classification in the Act is arbitrary and unreasonable it cannot be successfully attacked."

Conclusion

WHEREFORE, the appellees respectfully submit this statement showing that the question upon which the decision of this case depends is so unsubstantial as not to need further argument, and the appellees respectfully move the Court to dismiss this appeal, or, in the alternative, to affirm the judgment entered in this case by the Supreme Court of Appeals of Virginia.

Respectfully submitted,

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